Supreme Court, U.S.
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No. 99-1740

IN THE

Supreme Court of the United States

ATLAS TURNER, INC.,

Petitioner,

v.

LINDA HAMILTON, Individually and as Executrix of the Estate of GEORGE HAMILTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether this Court should deny the petition because: (1) whether the District Court abused its discretion on the factual issue of petitioner's waiver does not involve any consideration worthy of this Court's review; and (2) the Court of Appeals expressly applied the standard of review petitioner claims it should have applied, namely, abuse of discretion, and thus on its face the petition is meaningless.

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COUNTERSTATEMENT OF THE CASE

A. Nature of Case and Procedural History

This is a product liability and wrongful death action concerning a hard-working husband and father who, while barely 50 years old (and with the youngest of his eight children just born), was fatally stricken by malignant mesothelioma caused by his occupational exposure to petitioner Atlas Turner, Inc.'s ["Atlas"] asbestos-containing products.

After having denied Atlas's identical motion just before trial, the District Court inaccurately reinterpreted the facts and now ruled that Atlas had not waived its personal jurisdiction defense, although Atlas had: (1) actively litigated this action and fully participated in all proceedings over a four-year pre-trial period without raising any jurisdictional objection; (2) acquiesced in obtaining a transfer to the Eastern District of Pennsylvania several years prior to trial without raising any jurisdictional objection; (3) raised no objection whatsoever, jurisdictional or otherwise, when plaintiff moved to have this case retransferred to the Southern District of New York for trial; (4) raised no objection at the hearing before the Eastern District of Pennsylvania convened to Show Cause why the case should not be so retransferred; (5) then objected to the consolidation of this case with six others for trial on the sole ground that a companion case against Atlas would be tried in New York State court, thereby admitting that New York courts *did* have jurisdiction; (6) raised no jurisdictional objection at the pre-trial hearing setting a trial date; (7) raised no jurisdictional objection through the

original trial date; and (8) failed to raise any jurisdictional issue until the eve of trial.[1]

On appeal to the Second Circuit, plaintiff argued that Atlas had waived its jurisdictional defense under any standard, but that the Court should review the ruling *de novo*. The Second Circuit disagreed with the plaintiff on the issue of standard of review.

In its Opinion the Court emphasized at the outset that "[t]he District Court's ruling that Atlas did not waive personal jurisdiction *is reviewed for abuse of discretion*" [Pet.'s App. at 46a] (emphasis added). In its analysis the Court stressed that, "[i]n assessing whether forfeiture [or waiver] in this case not only occurred but was so clear *that the District Judge exceeded his allowable discretion* in ruling that forfeiture had not occurred, we consider all of the relevant circumstances" [*id.* at 47a] (emphasis added). After assessing the District Court's ruling in the light of those circumstances on the record, the Second Circuit concluded not only that there was a forfeiture, but that "this is the rare case where a district judge's contrary ruling *exceeds the bounds of allowable discretion*" [*id.* at 50a] (emphasis added).

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1. The jurisdictional issue itself was a close one under New York's long arm statute, Section 302(a)(3) of the Civil Practice Law and Rules. The District Court agreed that plaintiff sustained his injuries within the State of New York as a result of Atlas's tortious misconduct, and the circumstances otherwise established that Atlas: (a) conducted substantial business in the State; (b) had a clear reason to foresee that its misconduct would have consequences in the State; and (c) derived substantial revenue from interstate or international commerce.

In its Petition to the Second Circuit for Rehearing, Atlas did not suggest that the Court had somehow used the wrong standard of review. Rather, it claimed that the Court had "misapprehended the record" [Atlas Pet. for Rehearing, at 3], and had "misapprehended New York's long arm statute" [*id.* at 7]. Indeed, abuse of discretion *was* the very standard of review that Atlas favored, and which it continues to advocate in its instant petition. Abuse of discretion is precisely the standard that the Second Circuit expressly and repeatedly emphasized that it was applying.

Thus, Atlas's objection in the instant petition that the Court actually applied the *de novo* standard reduces to a claim either that the Second Circuit panel: (1) was not competent to apply the standard it enunciated; or (2) deliberately engaged in some sort of subterfuge. Either way, Atlas's argument is absurd.

B. Factual Background

On the eve of trial, more than four years after this action was filed, Atlas *for the first time* sought to litigate the issue of personal jurisdiction. During that four-year period, Atlas *fully participated* in numerous and substantial proceedings without once raising its jurisdictional objection, and even remained mute on that issue while Mr. Hamilton endured two grueling (for him) days of *in extremis* deposition in order to preserve his testimony.

Moreover, when plaintiffs requested a pre-trial conference and expedited trial date in 1994, Atlas failed to move to dismiss for lack of personal jurisdiction, but instead acquiesced when other defendants successfully sought transfer to the Eastern District of Pennsylvania. Even when

plaintiffs sought transfer back to the Southern District of New York for trial, Atlas failed to raise any jurisdictional objection, or any objection to transfer whatsoever.

In Pennsylvania the parties conducted substantial discovery and engaged in settlement discussions and court conferences,[2] all without any reference to the issue of *in personam* jurisdiction. Perhaps most significantly, Atlas did not proffer any jurisdictional objection even when the District Court in Pennsylvania, in late 1997, entered a Show Cause Order and held a hearing giving the parties one last chance to object to the transfer of this and six other cases back to the Southern District of New York *for trial.* In this regard, Atlas was then put on notice that, pursuant to Multidistrict Litigation Rule 14, this was the appropriate time to file any motions seeking "summary judgment, *judgment of dismissal* and judgment upon stipulation," Rule 14(a) (emphasis added).[3] Yet Atlas participated in a robust manner without once raising a jurisdictional objection, and no objection whatsoever to transfer, conduct which under Rule 14 "shall be treated as that party's acquiescence to the remand." Accordingly, this case was remanded to New York, resulting ultimately in a full-blown trial on the merits.

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2. Before the Second Circuit and in the instant petition, Atlas has tried to convey the misleading impression that this case was somehow in "limbo" while docketed in Pennsylvania. Atlas had suggested the same before the District Court [Pet.'s App. at 5a]. The opposite is true, however, because throughout this time Atlas actively litigated the merits of plaintiffs' claims against it, while never challenging (even in a passing comment) the Court's jurisdiction over it.

3. Rule 14(b) prescribes that only those actions "that ha[ve] not been terminated in the transferee district court shall be remanded by the Panel to the transferor district for trial."

Importantly, Atlas's (seemingly tactical) failure to raise the defense brought defendant significant benefits, not only regarding plaintiffs' lost practical opportunity to conduct jurisdictional discovery during the course of its substantive discovery, but also because during this period the statute of limitations ran on the Hamiltons' claims against Atlas in any other jurisdiction [Pet.'s App. at 4a]. Consequently, plaintiff was clearly and irreparably prejudiced by Atlas's failure to meaningfully raise this issue until the last possible minute.

For all of these reasons, the District Court, after retransfer to New York, denied Atlas's first motion, made on the eve of trial, to dismiss for lack of personal jurisdiction [Pet.'s App. at 6a]. The District Court at that time marshaled ways in which Atlas had participated in the litigation, as well as the prejudice caused by its delay in raising the defense [*id.* at 4a-5a]. However, notwithstanding its conclusion that "[t]he alleged prejudice to Plaintiff and Atlas's delay support a denial of its motion," the District Court failed to rule definitively, and allowed Atlas to renew the motion "upon a fuller record" [*id.* at 5a-6a].

The parties next litigated a full-blown trial, after which the jury unanimously determined that Atlas's negligent and reckless misconduct had caused Mr. Hamilton's death, and judgment was entered in favor of plaintiff and against Atlas.

Then, along with a host of post-trial motions, Atlas renewed its motion to dismiss on jurisdictional grounds. Tellingly, in support of its motion, Atlas did not rely upon any record materials that had not been in its hands four years prior. Now, unfortunately, the District Court concluded that, while "Atlas should have brought its motion sooner than it did[,] the delay was not substantial enough to warrant a finding of waiver" [Pet.'s App. at 28a].

Finding an abuse of discretion, the Second Circuit properly concluded that "Atlas gambled that it could raise the personal jurisdiction issue on the eve of trial, in case a trial occurred" [Pet.'s App. at 50a], but that, in so doing, Atlas forfeited any possible personal jurisdictional defense it may have had.

As the Second Circuit was also aware, Atlas has attempted various evasions over the years on the jurisdictional issue. It has been documented that, for well over two decades, Atlas has engaged in a pervasive scheme, including corporate reorganizations and refusal to produce sales records, to evade and defraud asbestos-related judgment creditors.

Numerous internal corporate documents reveal, *inter alia*, Atlas's deliberate plotting "with a view to their not paying any adverse judgments" [Joint Appendix before Second Circuit, at 296], as well as its express "hiving off of the manufacturing assets . . . to prevent seizure [by] judgment creditor[s]" [*id.* at 294]. Toward these ends, Atlas has systematically tried, and continues to try, to do anything it can, in its own words, to "deter all but the boldest (foolhardy?)" [*id.* at 296] plaintiffs from any proper and appropriate efforts to pursue their legitimate claims against it.[4]

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4. Atlas's scheme to evade jurisdiction has overwhelmingly been unsuccessful. *See, e.g., Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 111 (6th Cir. 1995); *Straub v. A.P. Greene, Inc.*, 38 F.3d 448, 450 (9th Cir. 1994); *Deptula v. Derr Flooring Co.*, 1990 WL 96635 (E.D. Pa. July 6, 1990); *Urbanski v. Eagle-Picher Indus., Inc.*, 1990 WL 31716 (E.D. Pa. Mar. 16, 1990); *Dehart v. AC and S, Inc.*, 682 F. Supp. 792 (D. Del. 1988); *Carre v. AC and S, Inc.*, 1986 WL 537 (E.D. Pa. Dec. 29, 1986); *In re Connecticut Asbestos Litig.*, 677

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REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PROVIDE A SINGLE COMPELLING REASON WARRANTING REVIEW BY THIS COURT

It is patent that the instant petition fails to raise even a colorable argument for reviewability under this Court's Rule 10. Atlas proffers not a single "compelling reason" for granting the petition. The Second Circuit's decision is not "in conflict" with the decision of any other court, and no "important federal question" is involved. Nor has the Second Circuit's decision "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10.

Atlas does not even allege that the Second Circuit erred in any way whatsoever in assessing the District Court's waiver ruling under an abuse of discretion standard. Instead, Atlas argues that the Second Circuit somehow implicitly or secretly applied a *de novo* standard of review, notwithstanding the Court's explicit and repeated assertions to the contrary. Even if Atlas were correct in this claim, and it clearly is not,[5] the "asserted error" would still not merit

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F. Supp. 70, 71-76 (D. Conn. 1986); *McDaniel v. Armstrong World Indus.*, 603 F. Supp. 1337, 1339 (D.D.C. 1985); *see also In re New York Asbestos Litig. — Consorti et al.*, 847 F. Supp. 1086, 1102, 1119 (S.D.N.Y. 1994), *aff'd in part*, 64 F.3d 781 (2d Cir. 1995), *vacated on other grounds*, 518 U.S. 1031, 116 S. Ct. 2576 (1996).

5. Atlas concedes that an abuse of discretion review entails an assessment of the District Court's ruling in the context of the factual (Cont'd)

this Court's review because it would involve only an allegedly "erroneous factual finding[] or the misapplication of a properly stated rule of law," which Rule 10 deems generally unreviewable.

With regard to the substance of the waiver issue, it is well settled, and Atlas does not deny, that the personal jurisdiction requirement "is a due process right that may be waived either explicitly or implicitly." *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 729 (2d Cir. 1998); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704-05, 102 S. Ct. 2099 (1982) ("[t]he actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not").

Courts have routinely held that, even if a litigant lists a jurisdictional defense in its answer, an undue delay in moving to dismiss on jurisdictional grounds can constitute waiver of the defense. *See generally Burton v. Northern Duchess Hosp.*, 106 F.R.D. 477, 480-81 (S.D.N.Y. 1985) (although defendants asserted jurisdictional defense in their answers, the defense is not preserved "in perpetuity," and three-and-a-half year delay was "inconsistent with defendants' assertion that the court lacks personal jurisdiction over them");

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record before the Court [Pet. at 10 ("assessment of the evidence")]. *See generally Gordon v. Washington*, 295 U.S. 30, 39-40, 55 S. Ct. 584, 589 (1935); *United States v. Goodson*, 204 F.3d 508, 512 (4th Cir. 2000). In its Opinion in this case, the Second Circuit explicitly stated that it was reviewing "all of the relevant circumstances" to determine not simply whether forfeiture in this case "occurred," as Atlas seems to be claiming, but whether forfeiture "was so clear that the District Judge exceeded his allowable discretion in ruling that forfeiture had not occurred . . ." [Pet.'s App. at 47a].

Sims v. Mme. Paulette Dry Cleaners, 638 F. Supp. 224, 227-28 (S.D.N.Y. 1986) (personal jurisdiction defense held waived because, after asserting the defense in their answer, defendants participated in the case and did not reassert the defense until the eve of trial); *Yeldell v. Tutt*, 913 F.2d 533, 538-39 (8th Cir. 1990) (holding that defense of personal jurisdiction " 'may be lost by failure to assert it seasonably,' " and that "[a]sserting a jurisdictional defect in the answer did 'not preserve the defense in perpetuity' ").

Indeed, this Court has denied certiorari where defendants have waived their personal jurisdictional defenses in cases involving much shorter delays than the four-year period at issue here. *E.g., Datskow v. Teledyne, Inc.*, 899 F.2d 1298, 1303 (2d Cir. 1990) (holding that four-month delay in raising jurisdictional defense combined with silence at appearances and conferences acted as waiver), *cert. denied*, 498 U.S. 854, 111 S.Ct. 149 (1990); *see also Continental Bank, N.A. v. Meyer*, 10 F.3d 1293 (7th Cir. 1993) (affirming that "defendants' active participation in the litigation for two-and-a-half years constituted a waiver of the personal jurisdiction defense").

It has also been uncontroversial that even a very short delay compels a finding of waiver when that delay prejudicially coincides, as in the present case, with the running of an applicable statute of limitations. *Datskow v. Teledyne, Inc.*, 899 F.2d at 1303; *see also Trustees of Central Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 733 (7th Cir. 1991) ("[w]here a defendant leads a plaintiff to believe that . . . no such defense will be interposed, for example, courts have not hesitated to conclude that the defense is waived"); *Broadcast Music, Inc. v. M.T.S. Enter., Inc.*, 811 F.2d 278, 281 (5th Cir. 1987).

Thus, the Second Circuit was certainly correct, as a substantive matter, in reversing the District Court's ruling that Atlas had not waived its personal jurisdiction defense. Moreover, the Second Circuit resolved the appeal under the abuse of discretion standard, which petitioner admits was the correct standard.

CONCLUSION

Atlas has failed to allege any meaningful basis for this Court's review. The Second Circuit correctly determined (using the very standard Atlas touts) that, under the unique factual circumstances of this case, the District Court had abused its discretion in ruling that Atlas had not waived its jurisdictional defense notwithstanding its active litigation and prejudicial four-year delay. Accordingly, for all of the reasons stated, the respondent respectfully requests that the Court reject Atlas's petition for a writ of certiorari.

Respectfully submitted,

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